

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

TRANSCRIPT OF PROCEEDINGS

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:
THE CITY OF HUNTINGTON, : CIVIL ACTION
:
Plaintiff, : NO. 3:17-cv-01362
:
vs. :
:
AMERISOURCEBERGEN DRUG :
CORPORATION, et al., :
:
Defendants. :
:
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:
CABELL COUNTY COMMISSION, : CIVIL ACTION
:
Plaintiff, : NO. 3:17-cv-01665
:
vs. :
:
AMERISOURCEBERGEN DRUG :
CORPORATION, et al., :
:
Defendants. :
:
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VIDEO PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE DAVID A. FABER
SENIOR UNITED STATES DISTRICT JUDGE

April 14, 2021

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APPEARANCES:

**For the Plaintiff,
Cabell County Commission:**

MR. PAUL T. FARRELL, JR. - (Video)
Greene Ketchum Farrell Bailey & Tweel
P.O. Box 2389
Huntington, WV 25724

MR. ANTHONY J. MAJESTRO - (Video)
Powell & Majestro
Suite P-1200
405 Capitol Street
Charleston, WV 25301

MR. LOUIS M. BOGRAD (Video)
Motley Rice
Suite 1001
401 9th Street NW
Washington, DC 20004

**For the Plaintiff,
City of Huntington:**

MS. ANNE MCGINNESS KEARSE - (Video)
Motley Rice
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464

APPEARANCES (Continued):

**For the Plaintiff,
City of Huntington:**

MR. MICHAEL J. FULLER, JR. - (Video)

McHugh Fuller Law Group
97 Elias Whiddon Road
Hattiesburg, MS 39402

MS. ANDREA BIERSTEIN - (Video)

Simmons Hanly Conroy
112 Madison Avenue
New York, NY 10016

**For the Defendant,
Cardinal Health:**

MS. ENU MAINIGI - (Video)

MS. JENNIFER WICHT - (Video)

Williams & Connolly
725 Twelfth Street, NW
Washington, DC 20005

MR. STEVEN R. RUBY - (Video)

Carey Douglas Kessler & Ruby
901 Chase Tower
707 Virginia Street, East
Charleston, WV 25301

MS. ASHLEY W. HARDIN - (Video)

Williams & Connolly
725 Twelfth Street, NW
Washington, DC 20005

APPEARANCES (Continued):

**For the Defendant,
McKesson:**

MR. JEFFREY M. WAKEFIELD - (Video)

Flaherty Sensabaugh & Bonasso

P.O. Box 3843

Charleston, WV 25338-3843

APPEARANCES (Continued):

MR. TIMOTHY C. HESTER - (Video)

MR. PAUL W. SCHMIDT - (Video)

MS. LAURA M. FLAHIVE WU - (Video)

MR. ANDREW STANNER - (Video)

Covington & Burling

One City Center

850 Tenth Street NW

Washington, DC 20001

**For the Defendant,
AmerisourceBergen Drug Corporation:**

MS. SHANNON E. MCCLURE - (Video)

MR. JOSEPH J. MAHADY - (Video)

Reed Smith

Three Logan Square

Suite 3100

1717 Arch Street

Philadelphia, PA 19103

MS. GRETCHEN M. CALLAS - (Video)

Jackson Kelly

P.O. Box 553

Charleston, WV 25322

APPEARANCES (Continued):

**For the Defendant
AmerisourceBergen Drug Corporation:**

MS. KIM M. WATTERSON - (Video)

Reed Smith
Suite 2900
355 South Grand Avenue
Los Angeles, CA 90071

MR. ROBERT A. NICHOLAS - (Video)

Reed Smith
Suite 3100
Three Logan Square
1717 Arch Street
Philadelphia, PA 19103

Court Reporter: Lisa A. Cook, RPR-RMR-CRR-FCRR

Proceedings recorded by mechanical stenography; transcript
produced by computer.

P R O C E E D I N G S

THE COURT: All right. This is another pre-trial conference and motions hearing in the *City of Huntington* against *AmerisourceBergen* and others case.

I assume all the attorneys have given your appearances to the court reporter. And she's nodding "yes" and I hear no objection to that.

So the first thing I have on the list, I thought we'd -- I should say something about the logistics. I know there have been a lot of discussions and things about that.

Can you all hear me?

(All counsel indicated an affirmative response.)

THE COURT: All right. The Centers for Disease Control limit suggests a cap of 30 people in the courtroom. If we have five attorneys per party, which I believe there have been discussions to allow, that's 25 people. The court family will have at least five members. That's 30. Then, of course, we'll have a witness and, in some cases, a witness counsel. So that fills up the courtroom where the trial is actually taking place.

As I've indicated before, I'm not going to allow a public feed on the -- I'm not going to allow any public feed. I will allow public feed for the final pre-trial. I'm concerned about the obligation to grant the public and the press access to the trial. And since there's not going

1 to be a public feed and there's so many persons involved,
2 that's difficult. But I think we can handle it.

3 We're going to provide an overflow courtroom which will
4 seat about 25 people I believe. And we can arrange a
5 separate overflow courtroom with a capacity of about 35 more
6 if, if we need it. Hopefully that will do it.

7 I read this morning the memo from Mr. Ruby suggesting
8 procedures, and I'm in agreement with everything in that.
9 And hopefully that will give everybody guidance on, on the
10 logistics.

11 The first motion I have for hearing is the plaintiffs'
12 motion to compel. This is ECF Number 1211 from the court
13 file. I understand Mr. Fuller for the plaintiffs and Ms.
14 Wicht for the defendants will argue this.

15 I'm informed that Ms. Wicht's monitor is not -- she's
16 not getting any video now. The Court won't be able to see
17 her.

18 But I think we can hear you, Ms. Wicht, and we'll make
19 the best of that situation.

20 Mr. Fuller, do you want to go ahead?

21 MR. FULLER: Yes, Your Honor, if it may please the
22 Court.

23 THE COURT: Yes.

24 MR. FULLER: Judge, this motion focuses around the
25 sales and data of Cardinal Health not just to CT2 or West

1 Virginia but across the country. And the, the information
2 has been provided via the ARCOS database which Your Honor
3 has heard some argument about that and Mr. McCann's working
4 with that. Mr. McCann will provide some opinions and, and
5 additional information related to that ARCOS database.

6 But all that information is is the defendants' sales
7 data. And what I've tried to do with the 1006 that I
8 provided to the defendants is simplify it because you're
9 dealing with millions upon millions of lines of data or
10 pills.

11 The 1006 basically sums up the Oxycontin and the
12 hydrocodone -- excuse me -- oxycodone and hydrocodone that
13 was delivered into each state. And there's significant
14 reasons why that's important in this litigation because one
15 of the things the defendants are looking for is what's
16 unusual; unusual size, pattern, and frequency.

17 And what this data demonstrates is it demonstrates that
18 while West Virginia is getting a significant number of
19 pills, it outweighs what is going into other states and
20 which would demonstrate what is unusual.

21 So, for example, just one for the Court, if we take a
22 look at Texas, Texas is about 15 times larger in population.
23 Yet, West Virginia got more oxycodone pills over the same
24 time frame than Texas did which would certainly speak to
25 something that is going on that is unusual.

1 Now, what the motion asks for, Judge, is not for you to
2 admit the 1006. The defendants make some reference to
3 that's what we're seeking. We're not. They've -- and,
4 quite frankly, I've worked very well with Ms. Wicht and the
5 other Cardinal counsel and we've been able to work a lot of
6 issues out. But the 1006, they tell me they object to it.
7 They won't specify why they object to it.

8 And then based on the stipulation that's part of the
9 record in this case with Cardinal, I said, all right, well,
10 give me a 30(b) witness that can tell me how the volume of
11 pills going to each state from the time frame of '06 to '14,
12 or just tell me how many pills you believe you've shipped
13 into each state.

14 THE COURT: Let me interrupt you.

15 MR. FULLER: Yes, Your Honor.

16 THE COURT: The problem I have with this is what
17 authority do I have to order the parties to do something
18 that's within their discretionary management of their case?
19 Do you have any authority that says I can do this?

20 MR. FULLER: Well, Judge, I'm relying on the
21 stipulation. The defendants are going to say, well, this
22 isn't their data. Well, it is their sales data. And the
23 stipulation requires if they're objecting to the
24 admissibility of something that we have the opportunity to
25 cure that before trial. And that's all I'm trying to do,

1 Judge.

2 THE COURT: I understand all that. But do you
3 have any authority for what you want me to do? You're
4 asking me to compel the defendants to stipulate here and I
5 don't -- I question whether I have any authority to do that.

6 That's sticking my nose into, into their trial tactics
7 and trial preparation. And there may well be a reason why
8 they're taking this action. And, and I need some authority
9 to persuade me that I can do this if I'm going to do it.

10 MR. FULLER: Sure, Judge, if that was what we were
11 asking for. And that's not what we're seeking, Your Honor.

12 What I'm simply seeking is to require them to provide
13 me a 30(b) who can give me the evidence that I need in a
14 form that's admissible, or they can just disclose to us what
15 they believe their sales data is.

16 The motion does not seek to have you require them to
17 stipulate. It does seek to have you order them to allow me
18 to correct any deficiencies that they are objecting to.

19 So I -- and I want to make that abundantly clear.
20 We're not asking you to force them to stipulate because I
21 believe Your Honor is correct. You don't have the authority
22 to do that. That's their prerogative.

23 But the Court does have the authority to require them
24 to give me a 30(b) so I can correct the deficiencies that
25 they perceive with the 1006.

1 THE COURT: Well, you ask in your motion for an
2 order compelling Cardinal Health, quote, to provide the
3 complete basis for refusing to stipulate to the accuracy of
4 plaintiffs' request. So --

5 MR. FULLER: Yes, Judge. I think -- I'm sorry.

6 THE COURT: So if, if I make them provide the
7 basis for refusing to stipulate, that's, in effect, ordering
8 them to stipulate, isn't it? I mean, it's just one step
9 away from that.

10 MR. FULLER: Well, Judge, I think it's requiring
11 them to tell us what is the -- what they believe is
12 deficient with it. And I think also in our "wherefore"
13 clause we ask that in the alternative they be ordered to
14 provide us what they believe their sales numbers are into
15 each state or to give us a 30(b) that can testify based on
16 the company's knowledge of what their sales numbers are into
17 each state.

18 THE COURT: Well, why can't you just get a 30(b)
19 without the Court's intervention? Is that, is that
20 inconsistent with the scheduling orders and so forth?

21 MR. FULLER: That, that is, Your Honor. That is.
22 And the reason I'm seeking it -- and we attached the
23 stipulation that we entered into with Cardinal on certain
24 issues -- is that that stipulation, when they object to
25 something being admissible, they stipulated that they would

1 provide us even a deponent if that's what we needed to cure
2 the defects. And that's simply what we're trying to do.

3 We're not asking this Court to force them to stipulate
4 because I think that would be absolutely improper. But the
5 Court could require them to provide a 30(b); or I think the
6 easiest way, Judge, is just say, hey, tell them what you
7 believe the distribution numbers are into each state. And
8 then I think we could work it out.

9 THE COURT: So, so basically -- I mean, I'm a
10 little bit -- basically, what you're asking for is for me
11 to, in a very limited method, reopen discovery so you can
12 take this 30(b). Is that right?

13 MR. FULLER: Or if they want to just produce to us
14 what they believe the sales numbers are into each state, I
15 think that would actually be the easiest, Judge. But, yes,
16 Your Honor, that's, that's what we're requesting.

17 THE COURT: And if, if you take the 30(b), you
18 would be after the information that you've just said you
19 thought they should voluntarily provide. Is that right?

20 MR. FULLER: Yes, Your Honor.

21 THE COURT: Okay. Let me hear from Ms. Wicht. I
22 hope you can hear all this and I'll hear from you now. And
23 if there's any problem with anybody hearing you, let me
24 know. Apparently we've got a partial breakdown in
25 technology here.

1 MS. WICHT: Good morning, Your Honor. Thank you
2 very much. I am able to see and I'm actually able to see
3 and hear everybody. I hope that everyone can hear me.

4 THE COURT: Well, I can certainly hear you and I
5 don't see anybody objecting on the screen here. So I
6 assume --

7 MS. WICHT: Okay.

8 THE COURT: And you're coming through loud and
9 clear in the courtroom.

10 MR. FULLER: We can hear fine, Judge.

11 MS. WICHT: Thank you, Your Honor.

12 Thank you, Mr. Fuller. I apologize for the technical
13 difficulties.

14 THE COURT: Can you hear her, Mr. Fuller? You're
15 the key man here.

16 MS. WICHT: I can.

17 MR. FULLER: Yes, Your Honor. I can hear her
18 clearly.

19 THE COURT: All right. Go ahead, please.

20 MS. WICHT: Thank you, Your Honor.

21 What plaintiffs are actually seeking in this motion,
22 Your Honor, is an order of the Court to force Cardinal
23 Health to stipulate to the accuracy of the work of
24 plaintiffs' expert.

25 There's nothing in the Federal Rules or the prior

1 stipulations of the parties that requires Cardinal Health to
2 agree with plaintiffs' expert, nor to provide testimony
3 after the expert's work was presented in an untimely
4 fashion, I might add, to identify their agreements or
5 disagreements with the expert.

6 Mr. Fuller and the plaintiffs in their papers and in
7 their argument today framed this as being an issue about
8 Cardinal Health's data, but that's not correct. That's not
9 what's been presented in these charts.

10 What's presented in the charts is that Cardinal Health
11 submitted distribution data to DEA through the ARCOS system.
12 DEA, presumably in the normal course of its operations, made
13 changes to that data, including adding 22 fields of
14 information that were generated and calculated by DEA,
15 including the principal one that's featured on plaintiffs'
16 summary which is dosage units.

17 DEA then produced that data to plaintiffs in this
18 litigation. And plaintiffs' expert, Dr. McCann, conducted
19 an analysis that resulted in other changes to the data that
20 he deemed to be necessary to make it accurate in his
21 opinion.

22 So that's the information that plaintiffs have
23 summarized in the charts that they've presented. So it's
24 not correct to say that they reflect Cardinal Health data.
25 They do not. They reflect plaintiffs' expert's analysis of

1 DEA data.

2 So a factual deposition of a Cardinal Health witness on
3 these charts, in addition to the fact that it's entirely out
4 of time under the scheduling order in the case, would be
5 entirely unproductive. There is no Cardinal Health fact
6 witness who could testify from personal knowledge about what
7 DEA did with the data or what plaintiffs' expert did with
8 the data to generate the numbers that appears on the charts.

9 I would also note, Your Honor, that the summaries that
10 have been presented with plaintiffs' motion actually were
11 not presented in Dr. McCann's expert report. What
12 plaintiffs have presented here is an analysis or a
13 calculation by Dr. McCann that is nationwide. It's not
14 limited to Cabell Huntington or to any other geographic
15 region.

16 Cardinal Health was not requested to produce nationwide
17 distribution data in this case. And Cardinal Health did not
18 produce nationwide distribution data in this case.

19 So to the extent that Mr. Fuller is talking about a
20 30(b)(6) deposition of Cardinal Health where the witness
21 would testify about Cardinal Health's internal distribution
22 numbers, that would be new discovery that we would be taking
23 in this case two and a half weeks before trial. That hasn't
24 been requested from Cardinal Health. It hasn't been
25 produced by Cardinal Health.

1 As to Dr. McCann's nationwide analysis, neither
2 Cardinal Health nor its litigation experts have undertaken
3 to evaluate all of the billions of data points that were
4 added by DEA before it produced the data in the litigation,
5 nor the tens of millions of changes that Dr. McCann made as
6 part of his litigation analysis.

7 The fact that the defendants didn't file a *Daubert*
8 motion as to Dr. McCann's ARCOS analysis and the fact that
9 Cardinal Health's experts didn't do a competing calculation
10 doesn't mean that we can be forced to agree that Dr.
11 McCann's analysis is correct.

12 As the Court noted at the outset, respectfully we
13 submit that there is nothing in the Federal Rules of Civil
14 Procedure or Federal Rules of Evidence or the stipulation
15 that would allow the Court to, to require that from Cardinal
16 Health.

17 The stipulation that Cardinal Health entered into with
18 plaintiffs pre-trial is to allow it to work with plaintiffs'
19 counsel to cure defects with respect to foundation of
20 Cardinal Health produced documents.

21 And I appreciate Mr. Fuller saying that we've been
22 working together cooperatively on that, and I, I share that
23 assessment. I think we have and we've resolved many, many
24 issues and we continue to work through those issues, but
25 this, respectfully, is not one of them. This is not

1 Cardinal Health data. This is plaintiffs' expert opinion
2 testimony, and Cardinal Health can't be compelled to
3 stipulate to it.

4 What will happen if the Court denies this motion is
5 what happens with expert analysis in every case in every
6 Federal Court across the country. The plaintiffs will
7 present their expert, Dr. McCann, for testimony. They will
8 qualify him as an expert in the subject matter. And
9 assuming they're able to do so, he will testify to his
10 analysis.

11 The defendants will cross-examine him about that
12 analysis to whatever degree they wish to do so. And the
13 fact finder -- here Your Honor - ultimately will make a
14 determination about what parts of the analysis are relevant
15 and whether it accepts or rejects the analysis.

16 And the last point I would make, Your Honor, is that to
17 the extent -- the Court has probably seen that the parties
18 have now stipulated that if plaintiffs prefer to do so, they
19 can bifurcate Dr. McCann's testimony.

20 The defendants have agreed that plaintiffs could call
21 Dr. McCann once just for the purpose of introducing whatever
22 ARCOS analysis the Court ultimately permits.

23 So to the extent that plaintiffs are using this motion
24 as a method of case structure and where, for example, they
25 want certain members in the case early instead of waiting,

1 first of all, they always have the opportunity to do that
2 through deciding what order they wanted to call their own
3 witnesses in. But now they have the opportunity to do it by
4 agreement with the defendants exactly the way they want even
5 if that requires Dr. McCann to testify at trial.

6 So the request that plaintiffs have made has no basis
7 in the rules, has no basis in the stipulations, and should
8 be denied by the Court.

9 I'm happy to address any additional questions that the
10 Court may have, but that's all I have this morning.

11 THE COURT: Thank you, Ms. Wicht.

12 Mr. Fuller, do you want to respond to any of that?

13 MR. FULLER: Sure, just briefly, Judge.

14 As I stated earlier, we're not asking for the Court to
15 require them to stipulate. We're simply asking for them to
16 tell us, "Hey, you're saying we have the numbers wrong."

17 And this isn't -- Judge, this isn't some complicated
18 math. This is counting the number of pills that you shipped
19 into each state. It's very simplistic.

20 A 30(b) designee wouldn't be asked, "Hey, look at these
21 numbers." The 30(b) would be asked, "What are your
22 numbers?"

23 And they would espouse whatever distributions Cardinal
24 did of hydrocodone and oxycodone into each state, or the
25 defendants could simply write it on a piece of paper and

1 send it over to us. "Hey, these are what we think the
2 numbers are. These are what we believe our distribution
3 numbers are."

4 They have the data. It's their information. They say
5 using ARCOS isn't theirs, but that's where ARCOS comes from,
6 Judge. It comes from each of these defendants.

7 Unless the Court has any other questions, --

8 THE COURT: I don't. I realize that this needs to
9 be decided expeditiously. I'm not going to rule on it from
10 the bench, but I'll get an order out right away deciding it.

11 Let's move on to the next motion. It is one of the
12 four parts of the motion *in limine*. It's ECF Number 1067 in
13 the file. And the matter before the Court is part three, I
14 believe, of that motion which goes to the issue of the
15 geographic scope.

16 Mr. Farrell, you're going to take the lead here I
17 believe.

18 MR. FARRELL: Judge, I would be honored to do so,
19 but it's the defendants' motion *in limine*. I'll respond to
20 it.

21 THE COURT: I'm reading -- your name is at the top
22 of the script, Mr. Farrell, and I just read it off. I'm
23 sorry. I think I've accused you before of being a defense
24 counsel in this case.

25 Ms. Hardin is the --

1 MS. HARDIN: Yes, sir. Can you see me and hear
2 me, Your Honor?

3 THE COURT: Yes, I can. I can see you well and
4 hear you loud and clear.

5 MS. HARDIN: Thank you.

6 THE COURT: You may proceed.

7 MS. HARDIN: Ashley Hardin from Williams &
8 Connolly on behalf of the distributor defendants, Your
9 Honor.

10 We selected this motion out of all the other motions *in*
11 *limine* because we believe that this motion in particular
12 will have significant impact on the scope of the evidence
13 that is presented at the trial. I think the previous
14 argument that you just heard demonstrates that.

15 And we expect this issue to come up as early as the
16 opening statements. So we appreciate the opportunity to
17 address this this morning, Your Honor, and hope that we can
18 receive a pre-trial ruling on this one so that your guidance
19 can inform the parties' final preparations for trial in the
20 next few weeks and set the parameters for what will and will
21 not be permissible during the opening statements.

22 THE COURT: All right. Well, my big question to
23 you is why shouldn't I just follow Judge Polster on this?

24 MS. HARDIN: Two reasons, Your Honor.

25 Number one, Judge Polster's reasonings are not law of

1 the case. The plaintiffs have already tried to get you to
2 adopt that reasoning. They did so at the February argument
3 on their motion for summary judgment on the Controlled
4 Substances Act. Your Honor rejected that premise when he
5 denied that, the plaintiffs' motion.

6 This motion has to do with what is the evidentiary
7 nexus to Cabell and Huntington. That was never before Judge
8 Polster. Judge Polster was not able to issue a ruling on
9 what evidence is connected to Cabell Huntington. So that's
10 the first reason.

11 And the second reason is that Judge Polster himself has
12 revisited that ruling in the Track 3 cases which involve
13 only the pharmacy defendants. This motion was renewed, and
14 he clarified that what he meant by his initial ruling was
15 that perhaps some aggregate data on the whole could be
16 admissible without relating specifically to the Track 1
17 jurisdiction in Ohio. But where specific evidence is
18 concerned, there must be a geographic and causal -- or at
19 least evidentiary nexus between the evidence and the
20 jurisdiction.

21 And here that is completely lacking, Your Honor. There
22 is not going to be a single witness, fact or expert, who
23 will testify, nor will a single piece of documentary
24 evidence in the case establish that a single pill
25 distributed by these three distributors to pharmacies

1 located outside Cabell and Huntington ever found their way
2 into Cabell Huntington and caused harm there.

3 Plaintiffs have a few theories as to why this evidence
4 is relevant, but none of them have any merit.

5 The first is their migration theory. And that is the
6 contention that pills distributed elsewhere to places like
7 Florida or Ohio or Kentucky or even into other places in
8 West Virginia were trafficked into Cabell and Huntington and
9 contributed to the public nuisance that plaintiffs allege is
10 happening here. But that migration theory is not connected
11 to the defendants in any way.

12 First of all, as I said, there's no evidence, witness
13 or documentary, that establishes that any pills that may
14 have been trafficked into Cabell Huntington were ever
15 distributed by these three distributors.

16 McKesson, Cardinal, and ABDC are not the only
17 distributors in West Virginia, are not the only distributors
18 in Florida, or in any other of the states that plaintiffs
19 have argued were the source of pills coming into Cabell and
20 Huntington, nor is there any evidence that these defendants
21 themselves participated in any, quote/unquote, migration.

22 So what migration means is criminal trafficking. It
23 means criminal diverters went to places outside of this
24 jurisdiction and brought pills back into the jurisdiction
25 for the purposes of illicit drug trafficking.

1 There is no allegation, much less evidence, in this
2 case that these three distributors ever distributed their
3 products to anyone other than DEA registered and state
4 licensed pharmacies.

5 And the plaintiffs' expert, their DEA expert, James
6 Rafalski, in his report is very clear about what he thinks
7 the source of this, quote/unquote, migration along what he
8 terms the Blue Highway or the Oxy Express from Florida to
9 West Virginia and that is criminal diversion. There's no
10 allegation that the defendants themselves participated in
11 that.

12 And even if there were some linkage between our pills
13 distributed somewhere else and those that found their way
14 into Cabell Huntington, which there isn't, but even if there
15 were, that is not evidence that the shipments themselves by
16 distributors into these other locales were themselves
17 wrongful or excessive because, of course, the mere fact that
18 a criminal traffics in drugs does not indicate that there is
19 any wrongdoing on the part of the defendants.

20 What the plaintiffs have, and all that they have, is
21 evidence that the defendants were aware of migration. But,
22 of course, being aware that criminal activity takes place is
23 not a sufficient evidentiary hook to admit evidence of our
24 distributions to other pharmacies.

25 The very documents that the plaintiffs cite make very

1 clear that we're not the only entities that had that
2 awareness; that the DEA itself was aware of migration and,
3 in fact, Cabell and Huntington local law enforcement were
4 aware of that migration.

5 So the mere fact of that criminal activity, of course,
6 does not indicate any wrongdoing on the part of
7 distributors. So their migration theory doesn't get them
8 there, Your Honor.

9 And then I think we just heard from Mr. Fuller that
10 they want to use certain national trends and national
11 distribution data to serve as perhaps a benchmark for what
12 the distributors should have known was reasonable or
13 appropriate shipments into Cabell Huntington itself.

14 But that is a nonstarter and it's a reason why the
15 argument about whether or not we have stipulated, produced
16 our national distribution data is really beside the point
17 because that national trend data cannot tell us anything
18 about what was reasonable and appropriate in Cabell
19 Huntington.

20 The mere -- the entire concept of an average, of
21 course, is that there were distributions to some pharmacies
22 that were higher and distributions to some pharmacies that
23 were lower.

24 So the mere fact that someone at these three
25 distributors might have known that the distributions to

1 either a single pharmacy in Cabell Huntington or to the
2 region as a whole were higher or lower than some other place
3 in the country or some other place, frankly, located within
4 West Virginia is irrelevant. That's not notice that
5 something was amiss in Cabell Huntington because there's a
6 reason why we evaluate suspicious orders on an
7 order-by-order pharmacy-by-pharmacy basis.

8 And that is because what makes an order reasonable or
9 of typical or usual size, frequency, or duration depends on
10 the location in which the pharmacy is located. What is it
11 near? What population does it serve?

12 And, so, making those evaluations with respect to
13 Cabell and Huntington are independent of and unrelated to
14 making those determinations for Texas or Florida.

15 THE COURT: Why doesn't this come in under 404(b)?

16 MS. HARDIN: It is actually prohibited under
17 404(b), Your Honor, because there is no causal nexus. There
18 is no evidentiary basis.

19 The only possible purpose that the plaintiffs can have
20 for utilizing this information, other than the national
21 trends that Mr. Fuller said, is as propensity evidence. And
22 they really make no bones about this. At Pages 14 and 15 of
23 their opposition, Your Honor, they indicate that they very
24 much want to make an "if it happened there, it must be
25 happening here" argument.

1 They want to argue that if we shipped too many pills to
2 Florida, for example, under our national policies and
3 procedures, then we must have also shipped too many pills to
4 Cabell and Huntington. That is a -- that's classic
5 propensity evidence, prior bad acts evidence that is
6 prohibited by 404(b).

7 There are exceptions, of course. Plaintiffs have not
8 argued for the applicability of any of the exceptions of
9 404(b). At most, what they muster in their opposition is to
10 say that some exception could become apparent, might become
11 available to them at the trial depending on how the evidence
12 comes in. But that's insufficient at this point, Your
13 Honor.

14 We made the motion. We, we brought forward the point
15 that there was no evidence linking these shipments outside
16 of the jurisdiction to Cabell Huntington and that it's
17 prohibited under 404(b). And plaintiffs have not come
18 forward to tell Your Honor what exception would apply or why
19 it would apply.

20 So 404(b) is prohibitive of this evidence. So it's
21 irrelevant. It's prohibited under 404(b). It's actually
22 going to prejudice the defendants. If, if the plaintiffs
23 are allowed in this case to base a liability finding for
24 nuisance in Cabell Huntington based on conduct that we took
25 in other places, then we're going to be subject to repeated

1 verdicts for the same conduct because those other
2 jurisdictions have also sued us, Your Honor.

3 The State of Florida has sued these three distributors.
4 And, so, we're going to fall to account for our conduct, our
5 shipments into Florida. And if there is evidence that they
6 were wrongful or in excess of what was allowable, the State
7 of Florida is going to litigate those claims.

8 As you know, 54 out of 55 West Virginia counties have
9 sued these three distributors. And, so, if we've made
10 inappropriate shipments to other places, that's going to be
11 litigated before the Mass Litigation Panel.

12 And, so, without a connection between conduct in those
13 jurisdictions and this jurisdiction, these plaintiffs cannot
14 hold us liable for that same conduct without subjecting us
15 to repeated judgments, and that's inappropriate.

16 And, of course, Your Honor it's going to be an enormous
17 waste of trial time. We're already slated to be together
18 for 12 weeks just talking about the issues that are relevant
19 to Cabell and Huntington. And if we have to devolve into a
20 bunch of mini trials talking about the various shipments
21 that were made to Florida or Ohio or Kentucky, we're going
22 to be here for a long time because defendants do not agree
23 that any of our conduct was wrongful in any of those places
24 anymore than we agree that it was wrongful in Cabell
25 Huntington.

1 And, so, if plaintiffs put forward evidence of
2 shipments to other places, defendants are going to want to
3 defend themselves. And we will be required to defend
4 ourselves and admit evidence about those shipments and it's
5 going to take trial time that we don't have and it's
6 irrelevant. And for that reason, we ask that Your Honor
7 exclude evidence of our out-of-jurisdiction shipments.

8 THE COURT: Thank you, Ms. Hardin.

9 Mr. Farrell, I now have you appropriately aligned in
10 this case with the defendants no longer and you may respond.

11 MR. FARRELL: Thank you, Your Honor. I will note
12 that there are other Farrells that practice law in this
13 state that would probably not mind being aligned on the
14 defense side.

15 Thank you, Judge. This is an important issue. And at
16 the outset, I wanted just to affirm that, yes, the
17 geographic scope has been the subject of not only discovery,
18 but evidentiary rulings in other courts.

19 But before we kind of get there, I want to -- I don't
20 want to engage in closing arguments right now. And, so,
21 some of what defense is raising is the weight of evidence
22 and the, the probative value of some of this evidence.

23 And I'm going to try to stay away from that as best as
24 I can and point out the irony initially that the defendants
25 are filing a motion in front of you to prevent you from

1 hearing evidence as a fact finder. And it seems like the
2 cat's out of the bag because you're the jury and the Judge.

3 That being said, the Fourth Circuit has already put
4 together some of these rules in saying that, you know,
5 prejudice for a bench trial, you get to weigh the evidence.

6 And, so, I'll say this at the outset. I am acutely
7 aware that the plaintiffs are going to need to follow the
8 rules of evidence. We're going to have to lay proper
9 foundations. We're going to have to be methodical. We're
10 going to have to stay within the facts and present to you a
11 case in order for us to prevail.

12 And, so, in general, what I can tell you is this. The
13 reason this information is important is because all three
14 defendants have acknowledged that they have a duty to
15 identify and monitor suspicious orders. All three
16 defendants have distribution centers across the country.
17 And all three defendants have acknowledged on the record
18 that their Suspicious Order Monitoring System, SOMS for
19 short, is systemic.

20 So for whatever successes these companies have in
21 complying with their duty, it's as a result of a systemic
22 process. And whatever failures it has is the result of a
23 systemic process.

24 So we intend to present evidence that what happened
25 with the volume of pills in Huntington, Cabell County was

1 not a mistake. It was not an isolated event. It was the
2 result of a systemic failure by each of the three defendants
3 to comply with their regulatory duties to identify, block,
4 and report suspicious orders.

5 Suspicious orders are defined in the Code of Federal
6 Regulations as orders that are of unusual size. In order
7 for us to determine what is unusual, we're going to have to
8 define what is usual. And to do so, what we have done is we
9 have hired experts to come in and review this data and
10 present it in a logical, methodical way to you so that we
11 can identify the facts of national, regional, state, and
12 local patterns.

13 And I will point this one thing out. The defense is
14 arguing that the national trends, the benchmark, cannot tell
15 us anything about what is suspicious. And I will point out
16 that that very argument is the basis of the DEA
17 investigating them, sanctioning them, and fining them for
18 the past decade.

19 I'll also point out that the defendants concede that
20 they were aware of migration. And I will point out that
21 there is a case that we will be discussing at great length
22 called *Direct Sales*, which is a case that was actually
23 provided to the defendants by the DEA. It's dated 1947 I
24 believe. And it talked very much about this awareness and
25 the culpable liability that comes with such awareness.

1 So, yes, we intend to discuss migration. We understand
2 we have an evidentiary burden. We will put on evidence
3 through our own internal documents. We will put on evidence
4 of the Oxy Express and Blue Highway through the DEA
5 documents. And we're going to put on evidence of the Oxy
6 Express and Blue Highway through the defendants' own
7 internal documents.

8 We're going to put on evidence that the problems that
9 were -- that, that resulted, the consequences and carnage
10 that happened in Cabell Huntington is the result of a
11 systemic failure.

12 We'll be able to establish that the volume of pills in
13 Huntington Cabell weren't being diffused by going in other
14 places because our surrounding counties were immersed in
15 pills themselves.

16 So, in general, an argument under 404(b), we understand
17 that, yes, we have obligations under the rules of evidence
18 regarding relevance and prejudice. You as the finder of
19 fact will be the gatekeeper and I'm sure will be very clear
20 as to when you've heard enough. And you'll be able to give
21 appropriate weight to the evidence.

22 THE COURT: And you're relying solely on 404(b) to
23 get this in, Mr. Farrell?

24 MR. FARRELL: Well, no, we think this is direct
25 evidence of their systemic failures. In addition to 404(b),

1 we'll be able to show that this was not a mistake, that this
2 was part of their plan.

3 THE COURT: When Judge Polster ruled it was
4 admissible, did he rely on 404(b) if you know?

5 MR. FARRELL: I do know. His direct quote I
6 believe -- I'm looking at Page 15 of our response, the end
7 of Page 14 bleeding onto Page 15. And what he basically
8 says is that evidence outside of Track 1, CT1, comes in. He
9 says this is particularly true because there is evidence
10 that defendants acted pursuant to practices and policies
11 that were national in scope.

12 So I don't have the order in front of me but, in
13 general, there not only is direct evidence, but we're also
14 going to be able to show the other counties and cities and
15 states for purposes of benchmarks. So I don't think this is
16 a back door attempt, Judge. This is blunt, direct evidence
17 of our case in chief.

18 THE COURT: Did Judge Polster revisit this issue
19 in the Track 3 cases?

20 MR. FARRELL: Now, my focus -- as you know, I am
21 the co-lead of the national litigation, so I'm going to
22 feign a little bit of, of a lack of knowledge on this.

23 I believe what is happening in CT3 is that we're still
24 in the discovery phase, and I fully anticipate that this
25 issue will be re-litigated. But the Judge entered a 75-page

1 evidentiary order that makes it pretty clear that he's going
2 to allow this into a jury.

3 And all I'm suggesting is that if we get to trial and I
4 have failed to put on proper evidence, I'm sure the defense
5 will be keen to object and you'll be, you'll be prompt in
6 sustaining the objection.

7 THE COURT: Well, I've got Judge Polster's order
8 in my hand and he very emphatically on the last page
9 indicated that in his view, the rulings he made should apply
10 to all the remanded cases.

11 I realize that's not binding upon me, but I have a lot
12 of respect for the work that he's put into it and I just --
13 I'll be asking your opponent this. But shouldn't I just
14 follow Judge Polster?

15 MR. FARRELL: Well, Judge, I --

16 MS. HARDIN: Your Honor -- I'm sorry. Did you
17 want Mr. Farrell to address that or me?

18 THE COURT: Yeah. I'll give you an opportunity in
19 a minute, Ms. Hardin.

20 Go ahead, Mr. Farrell.

21 MR. FARRELL: Yes.

22 THE COURT: Your answer was probably "yes."
23 Right?

24 MR. FARRELL: Yes, I would like for you to follow
25 Judge Polster's orders to the extent they help my case. And

1 I would ask you not to follow his orders to the extent that
2 it hurts my case.

3 THE COURT: Fair enough.

4 Ms. Hardin, do you want to respond to that?

5 And if you're not through, I'll get back to you, Mr.
6 Farrell.

7 Go ahead, Ms. Hardin. The issue is whether I should
8 follow Judge Polster or not.

9 MS. HARDIN: You're certainly not required to
10 follow Judge Polster. I think Your Honor just recognized
11 that. His rulings are not law of the case. As a general
12 matter, we've dealt with that already. We've put that issue
13 to the side. I take it from your rulings already you don't
14 adhere to the notion that they are law of the case.

15 But particularly when we are talking about motions and
16 what evidence has been adduced in this case, there's no
17 reason to follow Judge Polster. He didn't have this record
18 before him. He had a different record before him with
19 different evidence and different facts.

20 And, so, we ask Your Honor to make your own rulings
21 based on what the evidence is here.

22 But to Your Honor's question has he reconsidered or
23 re-evaluated, the answer is, yes. The Track 1 ruling is not
24 his final word on this issue.

25 On November the 3rd of 2020 -- and we cite this at Page

1 12 of our reply which is in this case Docket 1154 -- he says
2 this. He said while he would permit broad-scope aggregate
3 evidence related to things like nationwide trends and
4 shipments, which we certainly disagree with but that's his
5 ruling, he said extraterritorial evidence must have some
6 demonstrable nexus to the plaintiffs such as the fact that a
7 distribution center located outside of the plaintiff
8 counties distributes prescription opioids into them.

9 So even Judge Polster -- again, we disagree with the
10 broad scope of his ruling. But even he recognizes that when
11 you're talking about specific evidence, it needs to have a
12 demonstrable nexus.

13 I have other points to respond to Mr. Farrell, but I'm
14 not sure if he was finished or if he's got more to say or I
15 should continue.

16 THE COURT: Okay.

17 Do you have more to say, Mr. Farrell?

18 MR. FARRELL: I think I made clear I have more to
19 say. But right now, Judge, I think I've said what we need
20 to.

21 THE COURT: All right.

22 MS. HARDIN: Just a couple of points then if I
23 might, --

24 THE COURT: Yes, sure.

25 MS. HARDIN: -- Your Honor.

1 On the systemic failures point, if, if we have national
2 policies and procedures and they impacted what happened in
3 Cabell and Huntington, this motion is not trying to prevent
4 the plaintiffs from talking about that evidence.

5 If our Suspicious Order Monitoring System on the whole,
6 as they were implemented in Cabell Huntington, had certain
7 failures or inadequacies, I feel certain that Mr. Farrell
8 and his team are going to try and point that out and this
9 motion isn't going to try to keep them from doing so.

10 But what pills we shipped to other places pursuant to
11 those policies just is not relevant. It doesn't matter if
12 we shipped too many, too few, or just the right amount of
13 pills to a pharmacy in Florida or Ohio or Kentucky. That
14 does not mean that we shipped too many or too few or just
15 the right amount to Cabell and Huntington.

16 And, so, if they want to talk about why our policies
17 and Suspicious Order Monitoring Systems were insufficient
18 with regard to the decisions we made with respect to Cabell
19 Huntington pharmacies, they may do so. But they don't need
20 to tell you how we operated under those policies in some
21 other place. That's not going to inform what we did here.

22 And we've not put mistake at issue, Your Honor. We've
23 not argued that our distributions into Cabell Huntington
24 were a mistake. So they don't need to introduce evidence to
25 show that we didn't make a mistake. We're going to defend

1 our Suspicious Order Monitoring Programs on their merits.
2 But we have not said that somehow mistake or identity or
3 opportunity is at issue. So it just doesn't pull in 404(b).

4 And, again, the notion that unusual size, frequency, or
5 duration is (video inaudible) for a Cabell Huntington
6 pharmacy based on what might be happening in Florida or
7 Texas or New York City is incorrect. That's not how
8 suspicious orders are evaluated for the reasons that I
9 already said. They are locale and pharmacy specific.

10 And to the issue that this is an issue of weight of the
11 evidence, there is no evidence. We haven't talked about any
12 evidence that connects the distributors to the migration
13 theory. They have evidence of the migration theory to be
14 sure, but they don't have anything that connects us to that
15 theory. So that is not a sufficient basis on which to admit
16 our distributions from outside of the jurisdiction.

17 Thank you, Your Honor.

18 THE COURT: All right. I'm going to take this one
19 under advisement. And let's go on to the last thing on the,
20 on the agenda here. That's the defendants' motion to
21 exclude the marketing opinions of four experts. And Kim
22 Watterson is going to present this, I believe, for the
23 defendants.

24 MS. WATTERSON: That's correct, Your Honor. I
25 will check. Am I transmitting both audio and video to you?

1 THE COURT: You are, Ms. Watterson.

2 MS. WATTERSON: All right. Well, thank you. Kim
3 Watterson, Reed Smith. I'm here arguing today, though, on
4 behalf of all of the distributor defendants in this case.

5 And I think like the geographic scope issue that was
6 just argued, we really appreciate you hearing from us on
7 marketing because it too will help shape the scope of the
8 evidence in the case, or your rulings will, and it will have
9 an impact perhaps on the length of the trial.

10 Your Honor, it always helps me especially with a motion
11 like this where there's several experts implicated, several
12 moving parts in terms of the number of different *Daubert*
13 criteria at play to set forth a little bit of an inventory
14 before I start.

15 So there's going to be three basic parts to my argument
16 today.

17 First, I'm going to explain why three of plaintiffs'
18 marketing experts -- and I'm going to shorthand for now and
19 call them marketing experts - Keyes, Lembke, and Kolodny -
20 are not qualified to give an opinion on what again I'm
21 short-handing as marketing for now.

22 Second, I'm going to explain why those three experts,
23 Keyes, Lembke, and Kolodny, as well as plaintiffs' other
24 marketing expert, Jakki Mohr, on these experts plaintiffs
25 have not satisfied their burden. And, again, it's

1 plaintiffs' burden under *Daubert* to demonstrate reliability
2 and relevance when it comes to all four experts.

3 And, third, I'm going to talk about Professor Mohr in
4 and of herself and explain why, given her own descriptions
5 of the limitations in her opinion and what remains after we
6 look at those limitations, the testimony that she's going to
7 provide is simply not helpful to the Court. It doesn't meet
8 the criteria that expert testimony must be helpful to the
9 finder of fact. And, of course, Professor Mohr's testimony
10 doesn't fit the circumstances of this case.

11 And when we talk about Professor Mohr, I want to
12 foreshadow this. This Court's recent April 8th order is
13 going to come into play in that analysis.

14 A little bit of context before we begin to talk about
15 these experts.

16 Throughout this opioid litigation, plaintiffs'
17 marketing liability theory has focused on manufacturers.
18 That's reflected in the complaint that they filed in this
19 case.

20 If you look at Paragraphs 372 through 669, there's a
21 discussion of manufacturers' alleged marketing activities.
22 Their experts in this case until recently, that is, their
23 marketing experts have focused on manufacturers' conduct.

24 But now that we find ourselves in this case, and a few
25 others, where the distributors are the only defendants,

1 plaintiffs are trying to read the distributors --

2 THE COURT: Is it stronger against the
3 manufacturers than it is against the distributors or is it
4 comparable?

5 MS. WATTERSON: It is -- pardon me, Your Honor?
6 Did you say is it weaker or is it comparable?

7 THE COURT: All of the above. Is it -- I'm under
8 the impression that the plaintiffs' evidence is better
9 against the manufacturers, who aren't in this case anymore,
10 than it is against the distributors. And I'm just asking
11 you if you agree with that or not.

12 MS. WATTERSON: I think it's certainly better. I
13 think manufacturers have been the focus of their marketing
14 liability theory. I will argue today they do not have
15 expert testimony on the critical link in that theory.

16 You know, the marketing liability theory is that
17 defendants engaged in marketing activities that caused
18 physicians to prescribe more opioids. You know, stated in
19 its simplest fashion, that marketing drove the supply of
20 opioids by misleading physicians into prescribing more
21 opioids, not paying attention to the risks of opioids,
22 marketing that overstated the benefits.

23 So that's the marketing liability theory which, again,
24 I don't want to get caught up on this distinction between
25 manufacturers and distributors by way of setting forth the

1 context, but I do think it is an important context. And I
2 also think it lays the groundwork for why their marketing
3 experts, and particularly their marketing causation experts,
4 really don't have anything to say that passes *Daubert* muster
5 when it comes to distributors.

6 So let me start with qualifications. You know, we
7 talked a little bit about Judge Polster's order. Your
8 Honor, you asked us in our papers to indicate whether Judge
9 Polster has ruled on a particular issue that's before you.
10 So we did that.

11 Judge Polster ruled as to two of these experts, Lembke
12 and Keyes, and the reasoning applies equally to Kolodny,
13 that they do not have the requisite experience, education,
14 and training to render an opinion on marketing and its
15 effects on prescription prescribing.

16 Now, we're not just talking about Judge Polster's
17 opinions because we think it's the law of the case because
18 we don't think Judge Polster's opinions are law of the case.
19 But Judge Polster was perfectly correct, and we
20 independently demonstrate to you in our papers that Lembke,
21 Keyes, and Kolodny do not have the requisite experience.

22 Lembke is a medical doctor. She deals with addiction
23 and pain. She offers some opinions in this case that do not
24 deal with marketing and are not the subject of this motion.
25 But she has no background whatsoever in marketing.

1 Plaintiffs point to a book that she authored. But
2 authoring a book that mentions marketing does not qualify
3 her as an expert under the *Daubert* criteria. Plaintiffs say
4 repeatedly that Lembke, as well as Keyes, and as well as
5 Kolodny, are reading up on things in order to prepare to
6 testify in this case.

7 Well, this Court's opinion in *Salazar* has made very
8 clear you don't gain expertise just by getting ready to
9 testify in litigation as an expert. You don't become an
10 expert outside of your regular field just by reading up on
11 things.

12 Plaintiffs point to a class that Professor Lembke
13 teaches on the opioid epidemic, as she calls it. One day
14 she teaches a class throughout the entire course, just one
15 day, where she touches on marketing. That doesn't make her
16 an expert under *Daubert*.

17 The same goes for Keyes. Again, she's an
18 epidemiologist. She has no credentials that qualify her to
19 talk about marketing, and specifically whether marketing
20 here drove prescriptions of opioids or physicians'
21 prescriptions.

22 Again, what plaintiffs have to say is she's working
23 hard to get ready to go to testify. That doesn't pass
24 *Daubert* muster.

25 Interestingly, with respect to Keyes, this crash course

1 that she might be engaging in on marketing, by her own
2 admission she isn't even evaluating -- and we'll talk more
3 about this when we get to the reliability criteria. But she
4 doesn't even -- she disclaims having any knowledge of
5 distributor marketing. And she hasn't evaluated the
6 specific marketing materials that, that are at issue in this
7 case.

8 And, again, the same goes with Dr. Kolodny. Again, he
9 is a physician. He treats OUD. He is not positioned to
10 testify on marketing and marketing causation.

11 Plaintiffs may raise, because we're talking about other
12 judges' opinions, that the judge in Oklahoma issued a
13 one-liner allowing Dr. Kolodny to testify. But there's no
14 reasoning in that opinion, and nothing that suggests that
15 he's qualified under *Daubert*.

16 And, certainly, that pales in comparison to what I will
17 say is Judge Polster's well-reasoned analysis here and what
18 we argue in our papers looking specifically at what these
19 folks have by way of background, what they're lacking when
20 it comes to expertise in this area, and why under the
21 controlling case law they simply don't meet the
22 qualification criteria.

23 Your Honor, I'm going to move now on to the reliability
24 prong. Maybe fit and reliability are the two most important
25 touchstones under *Daubert*.

1 None of these experts offer a reliable opinion on
2 marketing causation, again defined as, in accordance with
3 plaintiffs' liability theory, the theory that distributors
4 engaged in marketing that drove an increase in the supply of
5 prescription opioids because they convinced doctors through
6 misleading statements to prescribe more opioids to more
7 patients in higher doses and for a greater multitude of
8 conditions.

9 So, again, that's the focus. That's the frame. That's
10 what these experts need to offer a reliable opinion on based
11 on a methodology, based on data, not simply speculation and
12 surmise.

13 So for starters, let me point out that Jakki Mohr, the
14 only expert of the four who has any background in training,
15 in marketing, she has essentially disclaimed having any
16 opinion on causation. She said her opinion is limited to
17 whether distributors engaged in marketing activity; were
18 these activities marketing; can they be considered
19 marketing.

20 She has no opinion that any of these activities were
21 false or misleading. And she has no opinion on whether any
22 of this marketing had an impact on the overall levels of
23 opioids prescribed, and certainly not on the overall level
24 of opioids prescribed in Cabell and Huntington.

25 Those experts that do purport to have an opinion on

1 marketing causation - Keyes, Lembke, and Kolodny - they
2 didn't employ any methodology at all. They didn't talk to
3 any physicians anywhere, and certainly not in Cabell and
4 Huntington, -- and we'll talk about that later specifically
5 with respect to the fit criteria -- to determine whether and
6 to what extent any of these marketing activities, whatever
7 they may be, whether and to what extent they influenced
8 prescribing. They just didn't do it.

9 You know, there isn't any pile of data that they looked
10 at to say, "Hey, physicians, did you get this information?
11 Did this move the needle?" There is no underlying data set,
12 and there was no methodology.

13 It's just, well, you know, if folks engage in marketing
14 and tout the benefits of opioids and underplay the risks
15 which, of course, is plaintiffs' theory, of course that
16 impacted physicians.

17 But I want to draw this Court's attention to the case
18 of *In Re: Actos* and *In Re: Diet Drugs*, as well as this
19 Court's opinion in *Salazar* as well. It says it's really
20 just speculation, you know. This is *In Re: Actos*. They
21 excluded marketing causation -- and I'm going to read what
22 it says -- because there was no foundation laid to show that
23 the experts knew what a physician actually knew, what
24 marketing materials the physician actually received, and
25 whether and to what extent the physician was impacted by

1 those marketing materials.

2 So there, there is no methodology at all. It really
3 amounts to an *ipse dixit*. They admit, and we cite in our
4 brief, all of the pages of the depositions where each of
5 these experts admitted they don't know whether any
6 distributors distributed marketing material. They don't
7 know whether any doctors saw such marketing material. They
8 don't know whether doctors relied on or the extent to which
9 they relied on these marketing materials in making
10 prescribing decisions.

11 Now, plaintiffs come back and say, well, you know, we
12 don't have to tell you which doctors. We don't have to
13 identify specific doctors that relied on these materials.

14 Your Honor, that's not our point. We're not faulting
15 the experts because they don't give us an inventory or list
16 or count up the numbers of doctors who say they relied on
17 these marketing materials.

18 It's simply that they don't have any methodology at
19 all. There wasn't any examination of underlying facts from
20 which they could draw their opinions. So it's *ipse dixit*.
21 It's guess. It's surmise. It's, it's speculation that
22 somehow these materials must have moved the needle.

23 That's not what *Daubert* requires. There has to be a
24 methodology. And there really is none here when it comes to
25 the question of whether they can opine that distributor

1 marketing moved the needle and influenced physician
2 prescribing.

3 Another thing, Your Honor, that's missing from the
4 Keyes, Kolodny, and Lembke opinions -- and it's nothing, by
5 the way, that Professor Mohr admits that she didn't do. You
6 know, all of these experts admit and agree that there are
7 other factors that influence prescription -- physician
8 prescribing; manufacturer conduct, DEA, FDA, physicians' own
9 judgments, et cetera, et cetera. So all of them agree that
10 there are other drivers of prescription prescribing.

11 When asked whether they did any assessment at all,
12 well, what role does this distributor marketing, if any,
13 play in the equation, none of them evaluated that. Mohr
14 said she didn't do it because she said that wasn't her task.
15 And she said in order to reach a conclusion on that
16 question, you would have to do, and her quote was an
17 economic, an econometric study that would take some time to
18 sort out. "That wasn't the scope of my task."

19 Well, Keyes, Kolodny, and Lembke didn't do that either.
20 So, again, it's *ipse dixit*. I hate to keep using that word
21 out of the Supreme Court precedent, but that's what it is.
22 They say we understand they did some marketing. It must
23 have moved the needle. But we can't tell you how much and
24 we can't tell you based upon a methodology and the
25 examination of data, a close examination of the marketing

1 material, and talking to physicians that it moved the
2 needle. We just suspect and surmise, well, it must have.

3 Now, also missing from the marketing experts' opinions
4 is fit. All of them admitted that they didn't do any look
5 into Cabell County. They don't know whether any of the
6 so-called marketing materials and marketing activities --
7 and, Your Honor, you'll notice I'm calling them so-called
8 because for the purposes of this motion now, we're not
9 probing into those materials and deciding, you know, whether
10 or not, or arguing that they weren't disseminated, whether
11 they were disseminated, and whether they really amount to
12 marketing.

13 But whatever the so-called marketing might be, none of
14 the experts know whether any of these marketing materials
15 made their way into Cabell and Huntington, whether
16 physicians in Cabell and Huntington looked at them, whether
17 they resulted in a prescription being written for someone in
18 Cabell and Huntington. They were all very honest about it.
19 They said that they didn't look into this jurisdiction.

20 So what they have to say simply doesn't fit this case
21 brought by Cabell and Huntington looking at impact in this
22 jurisdiction. So they all flunk the *Daubert* test when it
23 comes to both reliability and fit.

24 Now, I want to talk a little bit about Jakki Mohr
25 because interestingly, Your Honor, I mentioned to you that

1 she disclaims having any opinion at all on this marketing
2 causation question. She says, "All I'm really doing is
3 answering the question of whether distributors engaged in
4 marketing."

5 She's not opining on whether any of the so-called
6 marketing was false. And she says she didn't do any
7 analysis to determine whether or not that marketing, in
8 fact, moved the needle and led to physicians
9 overprescribing.

10 So all we are left with when it comes to what Jakki
11 Mohr has to say is an inventory of activities,
12 communications, programs that she looks at and she says,
13 "Yes, that amounts to marketing," not that this marketing
14 did anything to cause prescribing, not that it's false.
15 That meets the definition. "I'm a professor of marketing.
16 This meets the definition of marketing and this is how
17 marketing works."

18 Helpfulness to the trier of fact, as this Court has
19 said in its own opinions, is the, is the touchstone of the
20 Rule 702 analysis. How is that helpful to the Court? What
21 remains is she's going to get on the stand and she's going
22 to be the vehicle through which plaintiffs put on an
23 inventory of activities and communications. And then she's
24 going to say, "In my expert opinion, I think that's
25 marketing."

1 Well, first of all, whether an expert says it's
2 marketing or not doesn't inform the central question here.
3 The central question here is whether these communications or
4 programs, whatever you call them, marketing or something
5 else, influenced prescribing habits such that there was a
6 greater supply of opioids in Cabell and Huntington. She
7 can't say that.

8 And as this Court noted in its April 8th opinion,
9 experts -- expert testimony isn't the vehicle for a party,
10 here in this case the plaintiff, to get into evidence facts
11 about corporate documents or corporate activity.

12 So at the end of the day, that's really all that we're
13 left with when it comes to Jakki Mohr. And she should,
14 therefore, be excluded in her entirety. She has nothing to
15 say about causation. She has nothing to say about falsity.
16 She doesn't fit. She has nothing to say about Cabell.

17 And what's left of her testimony, again, this inventory
18 of activities and then affixing the marketing label on them,
19 that's not helpful to the trier of fact. That's not going
20 to help Your Honor determine whether plaintiffs' marketing
21 liability theory carries the day. And it's also not the
22 proper vehicle to put in the evidence about these so-called
23 marketing programs.

24 I think, Your Honor, I will stop there -- there's a lot
25 more to say, there's a lot going on with marketing -- and

1 I'll answer any questions that you might have.

2 THE COURT: I'm going to hear from Ms. Bierstein.

3 Thank you, Ms. Watterson.

4 MS. BIERSTEIN: Sorry, Your Honor. I had to
5 unmute. I had to remember to unmute. But can you hear me
6 now?

7 THE COURT: I can hear you loud and clear, Ms.
8 Bierstein.

9 MS. BIERSTEIN: Okay, great. Thank you. Good
10 morning, Your Honor. Andrea Bierstein, Simmons, Hanly,
11 Conroy, arguing for the plaintiffs.

12 This motion to exclude the marketing evidence of
13 plaintiffs' expert, as I'm going to try to demonstrate to
14 Your Honor, should be denied because each of the experts at
15 issue --

16 THE COURT: Let me interrupt you. Judge Polster
17 ruled at least two of these experts out. How -- why
18 shouldn't I do the same thing?

19 MS. BIERSTEIN: Well, I was going to get to Judge
20 Polster, but I'll get to him first since that's the focus of
21 Your Honor's question.

22 I noticed that all counsel, Ms. Watterson, Mr. Farrell,
23 we all seem to agree that you should follow Judge Polster
24 when we like what he does and that you shouldn't follow him
25 when we don't like what he does.

1 But, you know, looking more specifically here, I want
2 to say a few things about Judge Polster's ruling.

3 First of all, Judge Polster's ruling was extremely
4 narrow. The relief the defendants are asking for here is
5 quite a bit broader.

6 What Judge Polster did was to exclude very limited
7 amounts of testimony. And you see in his opinion it's like,
8 "Well, I'm not letting you say this paragraph and this
9 paragraph." It's very surgical.

10 And a lot of what's at issue here is simply either not
11 the subject of his ruling -- certainly was not -- the
12 breadth of what they're seeking to exclude is, is much
13 broader than what Judge Polster addressed.

14 But even as to what Judge Polster did address, the
15 record before him was quite different I think in, in certain
16 important ways from the record before Your Honor. And I
17 know this is kind of going a little bit backwards in terms
18 of, you know, the way I was going to present this.

19 But I want to start with what Judge Polster said about
20 Dr. Keyes in particular because one of -- because Judge
21 Polster's main criticism of Dr. Keyes -- and this is quoting
22 from his opinion -- was that her report, he said, does not
23 indicate that in formulating this opinion, Keyes performed
24 the methodology that is standard in the scientific process
25 of her field of expertise.

1 In other words, Keyes has not shown that she applied
2 epidemiological methods to determine that a cause/effect
3 relationship may be inferred from the study she cites.

4 So he didn't say -- I want to say he didn't even say
5 she hadn't used the methods, but he said her report didn't
6 show that she had.

7 And the report here is different because if you look on
8 Pages 29 to 31 of Dr. Keyes' report in this case, different
9 from her report in CT1, you will see that Dr. Keyes isn't
10 just reporting on articles, and I'm going to talk some more
11 later about this business of reading up, that she's not
12 only -- she's analyzing the literature specifically using
13 the epidemiological tools to do that. She's assessing the
14 extent to which the studies at issue are epidemiologically
15 sound.

16 And, so, what -- so what she's doing here is what she
17 didn't do in front of Judge Polster. She's demonstrating
18 that she's using her epidemiological expertise and her
19 epidemiological methods in looking at epidemiological
20 literature in order to reach her conclusions.

21 So I think she's cured of what Judge Polster was
22 concerned about which is, yes, what she's doing here is
23 epidemiology. And she obviously had not made that clear
24 enough in her CT1 report. We think that in the CT2 report
25 she has demonstrated to the Court that that is what she's

1 doing.

2 And I am going to come back and talk some more about
3 what she's doing and why it is epidemiology in just a
4 minute. But I did want to answer Your Honor's question.

5 I think with Dr. Lembke the situation is a little bit
6 different, but not that different. It's true that the
7 record in front of Judge Polster included original research
8 that Dr. Lembke had performed before writing her book.

9 By the way, you know, Ms. Watterson, the defendants
10 keep saying nobody ever talked to any doctors. Well, Dr.
11 Lembke did. When she researched her book, she did extensive
12 patient and physician interviews, as well as analyses of
13 published literature about prescribing.

14 And although a lot of that was in the record, Judge
15 Polster didn't mention any of that research when he found
16 her book to be an insufficient basis. And I don't know
17 whether he had focused on it or whether it sort of, you
18 know, didn't come to his attention. He doesn't say, "Well,
19 yes, she did all this research, but it's not enough."

20 And I want to say -- and this is where I want to talk
21 about reading up on something which we hear a lot about, how
22 you can't just read up to become an expert.

23 Well, that's not exactly true. And the reason it's not
24 exactly true, Your Honor, is that a literature search is a
25 respected and well recognized methodology that has passed

1 *Daubert* on numerous occasions and it's been recognized by
2 numerous courts.

3 There is a limitation on a literature search which is
4 that you need to have the right expertise. A medical doctor
5 can read medical literature and analyze it and figure out:
6 Is it sound? Was this study done correctly? Does this make
7 sense? If I read the same medical study, I could not bring
8 my expertise to bear to understand it.

9 So what you need when you're reading up on something,
10 you need to be reading up in your own field. And as long as
11 you're reading up in your own field so that you are -- you
12 have the same or similar expertise to the literature that
13 you're reading, you don't have to have had an opinion or
14 know the specific issue beforehand. You can read the
15 literature and, and form an opinion based on it if you bring
16 to bear the correct expertise.

17 And I want to circle back to talk about why Drs.
18 Lembke, Kolodny, and Keyes do bring the right expertise such
19 that the component of their work that involves literature
20 search is, is not a problem because they have the
21 qualifications to do it.

22 Before I get there, I'm going to circle back to a
23 couple of kind of preliminary points.

24 I did want to talk just for a second about Rule 702 and
25 *Daubert* generally. I'm sure Your Honor knows the purpose of

1 *Daubert* is for the Court to act as a gatekeeper with respect
2 to expert testimony. And as Mr. Farrell has already alluded
3 to, in this circumstance with a bench trial, the Court is
4 essentially a gatekeeper for itself.

5 So it's not to say we don't have to meet the
6 requirements of, of Rule 702. But as Your Honor recognized
7 in the *Grant Thornton* case, this applies differently in a
8 bench trial where the relevance and the helpfulness of the
9 evidence in particular can be more easily assessed at trial
10 in the context of the rest of the evidence that comes in.

11 And issues that may arguably go to weight rather than
12 admissibility or sufficiency, some defects in the
13 methodology or smaller gaps in qualification are also best
14 dealt with in the context of, of the trial because it's in
15 that context that the Court can see how helpful is it, how
16 relevant is it, how, you know, big a problem is this, you
17 know, methodological flaw that cross-examination has brought
18 out.

19 And because the Court is the gatekeeper for itself here
20 and not for, you know, a jury that may be swayed by the mere
21 fact that somebody with a Ph.D. is on the stand, I think the
22 Court needs to keep that in mind in applying this.

23 I also want to note that although the defendants'
24 motion is a little bit vague about exactly what parts of
25 these experts' opinions they're trying to include -- trying

1 to exclude. But the scope is pretty broad. They're asking
2 the Court to exclude large swaths of evidence, as I already
3 mentioned, way broader than what Judge Polster did, which
4 was very narrow.

5 But I also want to mention to Your Honor that the total
6 amount of testimony at issue here is small. This is not
7 going to shorten the trial by substantial amounts. And
8 that's because this motion contains no challenge to the
9 opinions of Dr. Lembke about addiction, about pain
10 medication, about the falsity of defendants'
11 misrepresentations, the host of other topics in her expert
12 report.

13 It includes no challenge to the rest of the opinions of
14 Dr. Keyes about opioid use disorder, diversion, the
15 connection between oversupply and harms. And it doesn't --
16 well, I'll get to the issues with Dr. Mohr because they now
17 say what I think was not clear in their motion, that they
18 think she should be excluded in her entirety. But it
19 doesn't address the rest of Dr. Kolodny's opinions about
20 oversupply and the opioid epidemic.

21 So we're talking about a smaller amount of testimony.
22 And it's in that circumstance again that it's especially
23 appropriate for the Court to hear all of the evidence and
24 determine in the context of the trial whether to consider
25 this evidence and, if so, what weight to give it.

1 It would not make sense for the -- for even in a bench
2 trial for a Court to do that for weeks and weeks of
3 testimony that takes up everyone's time only for the Court
4 to say at the end, "Well, I'm sorry, but really that, you
5 know, I don't see it."

6 But where it's a small amount of testimony and where I
7 think I'm, I'm hoping to demonstrate we do meet the
8 requirements, the threshold requirements, the Court will be
9 better positioned in the context of the trial to assess the
10 relevance, the fit, the methodology, and all the, all the
11 rest of that.

12 Before I, I talk more specifically about the
13 qualifications of our experts, though, I do want to hit two
14 other points.

15 And the first has to do with the term "marketing" which
16 is in some ways a little bit misleading. But I think it
17 also helps understand why Dr. Mohr's testimony is so helpful
18 here.

19 When we think of marketing, I think most of us think of
20 advertising and maybe a little bit of PR. But what we're
21 talking about here is really much broader, just how do you
22 change perceptions of a product so as to increase (video
23 inaudible) it fails. How do you get the relevant
24 decision-makers to think differently about your product.

25 Now, that includes advertising and branding and

1 promotion, but it includes a lot more. It includes issue
2 management. It includes education. It includes all the
3 ways that you change people's minds in order to make them
4 receptive. It may include lobbying. It may include working
5 with medical societies. It may include getting your message
6 into continuing medical education.

7 It is a very broad -- the activities at issue here are
8 very broad. And the word "marketing" does encompass that,
9 but it's not necessarily what most of us think of as
10 marketing.

11 And Dr. Mohr, who is an expert in exactly this issue,
12 explains that in her report. She explains how broad
13 marketing is and she explains the role of issue management
14 and other aspects of marketing.

15 So that when she says, "I've looked at what the
16 defendants did and, yep, that's marketing," you know, and
17 they say, "Well, that's not helpful to the fact finder,"
18 well, it's helpful to the fact finder when the marketing
19 strategies go way beyond what we usually think of as
20 marketing.

21 It's also helpful to the fact finder because the other
22 thing that Dr. Mohr is an expert in is something called
23 channel management. And this has to do with the way
24 manufacturers, distributors, and retailers work together in
25 order to get -- to market a product, to increase sales.

1 They have an aligned interest. The manufacturer wants
2 to increase sales. The distributor makes a profit off how
3 much is sold and so does the retailer. And the ways in
4 which the different actors in a supply chain work together
5 in order to do that is critical and important information
6 that is not simply obvious, that is not known to everyone
7 who doesn't have a marketing background. And this --

8 THE COURT: Did Dr. Mohr's, Professor Mohr's
9 opinion reach the issue of causation? Did she have an
10 opinion on whether the marketing -- the distributor
11 marketing tactics were actually a cause of the damage,
12 damages alleged by the plaintiffs in the case?

13 MS. BIERSTEIN: I don't believe that she does. I
14 think it is the other experts who can identify the causal
15 connection. She's in a position to identify the scope of
16 those activities and how those activities work in the
17 marketplace.

18 THE COURT: So if the other experts on this point
19 are excluded, there would be no evidence of causation.
20 Right?

21 MS. BIERSTEIN: I don't think that's true, Your
22 Honor. I think there would be no expert evidence of
23 causation. There's plenty of other evidence of causation.

24 For example, a lot of -- certainly, the manufacturers,
25 and I think perhaps the distributors, and I'm going to get

1 in a minute to that connection, did their own internal
2 analyses of causation.

3 THE COURT: That was a bad question. I should
4 have limited it to experts. So you don't need to go further
5 on this point --

6 MS. BIERSTEIN: Okay, all right.

7 THE COURT: -- because I asked a bad question.

8 MS. BIERSTEIN: Yeah, okay.

9 So -- but, yes, it is the other experts that we're
10 relying on to make this, this causal connection.

11 And before I turn again to why these experts are
12 qualified to do that, I do want to say that -- and I think
13 this is a really important point to understand what's going
14 on with these experts.

15 One of the defendants' points is that they say we
16 haven't distinguished and our experts haven't distinguished
17 the effect of distributor marketing from that of
18 manufacturer marketing.

19 And I want to say, Your Honor, I think that gets to the
20 heart of the issue because that criticism is really a
21 non-sequitur. It misses the point.

22 What we're saying here is that the defendants and the
23 manufacturers were acting in concert on a single marketing
24 scheme to alter the perceptions of doctors and patients
25 about the risks and benefits of opioids.

1 The distributors offered marketing services to the
2 manufacturers to help the manufacturers with their
3 marketing. It's not two separate streams of marketing where
4 the experts need to say what was the effect of this stream,
5 what was the effect of that stream.

6 THE COURT: So if you succeed on this point, you
7 bootstrap any weakness you have in the evidence against the
8 distributors by tying them to the marketing -- to the, to
9 the manufacturers against whom your evidence may be
10 stronger. Right?

11 MS. BIERSTEIN: I think that's right, Your Honor.
12 And I -- we understand -- we do still need to prove that to
13 you. We have to prove that they acted in concert. And we
14 have to prove to you that it was one scheme.

15 And we think the documentary evidence at trial will
16 show that. But once that's established, that's correct.
17 Now we're in the world of looking at what was the effect of
18 that scheme.

19 And here's the interesting thing. Your Honor refers to
20 that evidence about the manufacturer scheme. You know,
21 you've said it's better or stronger. But what I think is
22 interesting about it is that there really isn't a dispute
23 about the causal connection between that marketing activity
24 and the huge increase in prescribing and sales of opioids
25 that occurred in West Virginia and around the country.

1 Defendants have been saying all along that marketing
2 changed the standard of care and caused an increase in
3 prescribing. They've just been saying it was the
4 manufacturers' marketing, not ours. But they have -- you
5 know, when they thought we were only talking about the
6 manufacturers, they were happy to say our SOMS failures
7 didn't cause the oversupplies they argue. The oversupply
8 was caused by those manufacturers and their marketing
9 scheme.

10 So they've been saying for a long time that it's the
11 marketing scheme that brought all the pills to West
12 Virginia, not our SOMS failures. Now, we, of course, are
13 saying it's both. It's the SOMS failures and the marketing
14 scheme.

15 But, more important, we're saying you defendants, you
16 were working with them on the marketing scheme. You were in
17 concert. And you are just as responsible for it when you
18 signed up and said, "Hi. How can we help you with your
19 marketing? We'd like to be part of that." And, so, that I
20 think is an important crux of, of this case.

21 Now I want to turn to what I think is the heart of
22 defendants' motion, their attack on Drs. Lembke, Keyes, and
23 Kolodny, which I think is the misconception that marketing
24 professionals are the only ones who can assess the
25 effectiveness of marketing here, that they are the only ones

1 who are qualified to talk about causation.

2 And, you know, so we have a situation. A company or a
3 group of companies spends millions of dollars on marketing.
4 The sales go through the roof. But the theory is that only
5 a marketing professional can tell us if the two things are
6 connected, if the increase -- if the marketing plan and all
7 the money they spent actually caused the sales to go through
8 the roof.

9 Now, I will say there's a superficial appeal to that
10 argument. After all, we all know that correlation isn't
11 necessarily causation. So, you know, you put in the money,
12 the sales go up. How do we know? Someone has to assess
13 whether there was a connection, whether the sales would have
14 gone up anyway even without the investment and the
15 marketing.

16 But I want to try to (video inaudible) marketing
17 professional can do that while appealing is simply wrong, at
18 least in this context. When we're dealing with
19 pharmaceuticals and disease like OUD, I think there's at
20 least two categories of professionals who are at least as
21 well situated, if not better, than marketing people to
22 assess causation. And that's doctors and epidemiologists.
23 And I want to try to explain why that is.

24 So I want to start with epidemiology. The *Reference*
25 *Manual on Scientific Evidence* tells us that epidemiology is

1 the field of public health and medicine that studies the
2 incidence, distribution, and etiology of disease in human
3 populations.

4 And etiology is that fancy word they always use for
5 cause. We all want to say, "Why don't you just say cause?"

6 But, anyway, the point is epidemiologists, the, their,
7 their field, their expertise of three things, incidence,
8 distribution, cause of disease in populations. So studying
9 causes of disease is the expertise of an epidemiologist.

10 Is the epidemiologist an expert in every disease? No.
11 Is the epidemiologist an expert in every cause
12 independently? Again, no. But the epidemiologist's
13 expertise is in assessing the relationship between cause and
14 effect, of looking at the data of, you know, of an input and
15 exposure and an effect and drilling into is that causal.
16 That is exactly what epidemiologists do.

17 And I want to make a little bit of a digression. I
18 hope I won't take up too much of your time with this. But I
19 think it's a helpful illustration.

20 There was a book out a couple of years ago. I don't
21 know if, you know, if Your Honor would have noticed it,
22 about a guy named John Snow. And John Snow was a doctor in
23 England and he's considered one of the founders of
24 epidemiology.

25 And that's because there was a cholera pandemic in the

1 middle of the 19th Century. It was worldwide. It was a
2 pandemic kind of like what we're dealing with now except it
3 was cholera which I think is way worse.

4 And there was a particular outbreak in London that
5 caught his attention. And nobody knew then what caused
6 cholera, but Dr. Snow figured out that the cholera was
7 transmitted through contaminated water and, in particular,
8 through a particular pump in London where a lot of people
9 got their water.

10 Now, he wasn't an expert in pumps but what he was an
11 expert in, besides medicine generally, was analyzing data in
12 a systematic way to figure out what the cause of an outbreak
13 was.

14 So he looked at who got the disease and who didn't,
15 where it happened and where it didn't. And he made the
16 connections to figure out, you know, based on those, those
17 factors was this causal or not.

18 And since then, epidemiology has developed. It's
19 advanced. They've come up with more advanced systems to
20 assess whether an association is causal or not.

21 This is Dr. Keyes' field. She's an epidemiologist.
22 And not only is she an epidemiologist, her field of
23 expertise is substance abuse. She studies the incidence,
24 distribution, and causes of substance abuse. That's what
25 she does when she's not working for us. That's her day job.

1 It has nothing to do with us having hired her.

2 Now, if you want to figure out how to prevent people
3 from getting OUD, you need to understand the causes. If you
4 don't know why we're having this outbreak, you can't figure
5 out how to stop it. You can't prevent something if you
6 don't know what's causing it.

7 And as part of her work as an epidemiologist, again not
8 part of this case, just part of her regular job, she is part
9 of a large NIH grant funded initiative aiming to reduce
10 opioid overdose; specifically, you know, to develop
11 strategies to figure out what's going to make it go away.

12 So here's Dr. Keyes out in the field assessing what's
13 caused the opioid epidemic and how to prevent folks from
14 getting it and, therefore, from overdosing.

15 Now, according to the defendants, Dr. Keyes may be
16 qualified to tell us about all the other potential causes of
17 substance abuse; familial history or mental illness or
18 anything else that might be correlated.

19 But somehow, according to the defendants, when it comes
20 to the -- this particular cause, the potential causal effect
21 of marketing, suddenly only a marketing professional can do
22 that. I mean, it would -- you know, it would be as if to
23 say only a genetic counselor could assess the role of
24 familial history in, in causing OUD.

25 This is what Dr. Keyes does for a living. So it's --

1 to say that she suddenly can address all the other potential
2 causes using the statistical tools and sophistication, but
3 suddenly can't talk about this one because it's marketing I
4 don't think makes sense.

5 And this is particularly true because -- you know, this
6 bleeds into the issue of methodology. The methodology here
7 involves looking at studies. And one of the things that an
8 epidemiologist is an expert in is reading studies of those
9 kinds of studies, population studies, studies between cause
10 and effect. This is what she does.

11 So when Dr. Keyes tells you, "Well, what I did is to
12 read some studies," yes, that's what she does. You know,
13 the epidemiologist looks at the studies that found
14 correlation and figures out if it's causal.

15 So there is literature on the role of marketing and
16 prescribing. And, so, there's nothing surprising about an
17 epidemiologist looking at that.

18 The situation for the medical doctors, Dr. Lembke and
19 Dr. Kolodny, is a little different, although it's similar.
20 And, again, it comes down to the specifics of what the
21 marketing case here is about.

22 So what we've said and we're going to prove are that
23 before the defendants and the manufacturers got busy with
24 all that marketing, doctors prescribed opioids in a certain
25 way, in a very limited way according to certain guidelines

1 and precepts that kept the prescribing low.

2 Second, that after all the marketing, doctors
3 prescribed differently. Suddenly they were prescribing very
4 loosely as if every ailment needed an opioid.

5 And, third, and this is very important, that much of
6 the marketing was false and fraudulent.

7 So, you know, if we look at what expertise a medical
8 doctor has with respect to those elements, and then we'll
9 talk about why that helps us with causation, a medical
10 doctor has the expertise to tell us how doctors used to
11 prescribe opioids and to understand what it would take for
12 doctors to change their minds about that; if, if you are an
13 addiction or pain or an addiction and pain doctor, to
14 understand why did we used to do it that way and why are we
15 now doing it differently.

16 In addition to that, doctors like Dr. Lembke and Dr.
17 Kolodny have the expertise to know what about the marketing
18 was false. And this is absolutely critical and here's why.

19 If everything the defendants and the manufacturers had
20 said about opioids was true, there were a lot of ways
21 doctors could have come to believe that mass prescribing was
22 a good idea. They could have figured it out themselves.
23 They could have observed their own patients and come to that
24 conclusion. They could have read studies that the
25 defendants and manufacturers had nothing to do with because

1 there are a lot of independent sources for things that are
2 true.

3 The problem is that when something is not true, it
4 becomes easy to trace. When somebody says something false,
5 a particular thing and someone else down the road is
6 repeating that exact thing, it's easier to see the influence
7 of the liar. And why is it easier to see? Because there
8 are no independent sources for things that are false. There
9 are many independent sources for things that are true.

10 So if the defendants and the manufacturers began
11 promoting a particular set of misrepresentations and after a
12 while lots of doctors started behaving as if those
13 misrepresentations were true, well, where did they get that?
14 What were the other sources available to doctors to make
15 them believe those things? And how did they come to believe
16 them? What was the role of continuing medical education in
17 getting doctors to believe those things?

18 An addiction specialist like Dr. Lembke and Dr.
19 Kolodny, these doctors have the expertise to know what the
20 doctors were doing before, what it would take for them to
21 change their mind. They have the historical knowledge of
22 what it did take, what actually made their colleagues change
23 their mind. And they have the expertise to trace which of
24 the messages were false and to see how those particular
25 false messages came to pervade the medical community.

1 They also have the expertise to read the literature
2 about the effect of marketing on prescribing. And that
3 literature, Your Honor, includes an understanding that
4 doctors themselves are not the best reporters of the sources
5 of their own, you know, of their own ideas about
6 prescribing.

7 And I want to say a couple of things specifically about
8 Dr. Kolodny who was not the subject of Judge Polster's
9 order. He wasn't an expert in the CT1.

10 Dr. Kolodny has spent approximately 17 years
11 researching specifically the industry-funded campaign to
12 increase prescribing of opioids and the relationship between
13 the opioid industry and pain organizations. He co-founded
14 Physicians For Responsible Prescribing long before his
15 involvement in this case which focused specifically on the
16 role of marketing and the need for counter education to
17 combat misinformation.

18 So he has spent 17 years or so devoting his life and
19 his professional career to understanding how we got here,
20 how did we get to this opioid crisis, and what role did the
21 marketing of opioids play in that.

22 Not only that, he's been consulted by the U.S. Senate,
23 Finance Committee specifically, on the question of the role
24 of manufacturers and marketing in causing the opioid crisis.

25 He's been asked to provide his expertise about the

1 causes of the opioid epidemic to numerous groups, including
2 The World Health Organization, The National Governors
3 Association, The National Association of State Attorneys
4 General, The National Judicial Opioid Task Force, The
5 National Academy of Sciences, and bipartisan members of
6 Congress. He's been invited to testify before Congress
7 before a host of committees. And the expertise for which
8 he's been consulted has specifically included the causes of
9 the opioid epidemic.

10 So to say that he's not qualified to talk about this
11 one particular cause, the role of marketing in causing it, I
12 think is really to turn on its head the notion of (video
13 inaudible) for everyone else on the role of marketing in the
14 opioid epidemic to say that he's not qualified to be an
15 expert in a bench trial before Your Honor when The World
16 Health Organization wants to hear from him on how marketing
17 related to, to causes I think is really to stretch *Daubert*
18 beyond what, what it can do.

19 I've taken up a lot of time with that and I want to try
20 to be brief on my last couple of points.

21 The defendants say that the experts used no methodology
22 at all. And I think that's, that's simply not correct. As
23 we've talked about, Dr. Lembke did her own independent
24 research. She read a lot of -- she read literature.

25 Dr. Kolodny has done a lot of his own independent

1 research on literature in delving into where did this
2 problem come from.

3 Dr. Keyes used her epidemiological methods to look at
4 the limited amount of studies that there are on this.

5 So I think we do have a methodology. It's just not the
6 methodology that the defendants want, although, as I say,
7 with Dr. Lembke, she actually did talk to doctors. But the
8 notion that the best way to do this is to ask doctors what
9 affected them I think is fundamentally wrong.

10 The case is about public health. It's about large
11 overall risks. Not every doctor had to be convinced in
12 order for this to become a problem. It was enough to get a
13 core of people.

14 And, so, I think -- and if we did have particular
15 interviews, then the defendants could just say, "Well,
16 that's anecdotal. This doctor says, 'Yeah, I listened.
17 This doctor says, 'I didn't.'"

18 Instead what we've looked at are the broad trends.
19 What were the marketing materials? Where did they do? What
20 happened to the sales? What happened to continuing medical
21 education? What happened to the guidelines? And was any of
22 this true?

23 I want to say two things about the Actos decision in
24 particular which was mentioned. I think Actos is quite
25 distinguishable. I think any case where we're dealing with

1 individual personal injury cases requires a plaintiff to
2 show that his or her particular doctor relied. But because
3 we are talking about public health, we just need to show
4 that the trend of the increase in sales that devastated the
5 communities, that was caused by the marketing. And, so, it
6 doesn't matter to identify particular people in order to do
7 that.

8 I think for the same reason the opinions don't need to
9 be specific to West Virginia. The marketing campaign of the
10 defendants and the manufacturers was nationwide in scope.
11 It aimed to change the understanding of the risks and
12 benefits of opioids throughout the United States. And that
13 understanding was changed, and the number of prescriptions
14 increased substantially in West Virginia as in other parts
15 of the country.

16 And these experts have studied that nationwide change
17 and they've concluded that the marketing behavior caused the
18 increase. And surely the fact finder could conclude that
19 when you have the same behavior and the same outcome all
20 over the country, and the experts have seen a causal
21 connection overall, that it's causal here too.

22 The risks and benefits of opioids are the same here as
23 everywhere, and the marketing campaign was no less
24 fraudulent here than anywhere else.

25 So if somebody wants to come up with a theory that

1 while doctors all over the country came to believe things
2 that weren't true because of the defendants and the
3 manufacturers, but somehow in West Virginia doctors came to
4 believe the same untrue things by a completely different
5 route, I don't think it's plaintiffs' burden to eliminate
6 that remaining speculative possibility. It may be the
7 subject of cross-examination. It may be something for Your
8 Honor to take into account as to weight. But I don't think
9 it's our burden to chase down every last, you know,
10 possibility that somehow West Virginia was on a different
11 planet than everybody else.

12 I think the last thing I wanted to say -- I think I've
13 already talked about Dr. Mohr and why the rest of her
14 opinion is helpful to the fact finder. We understand that
15 Dr. Mohr's testimony will need to comply with the Court's
16 April 8th order which defendants mentioned.

17 But she has a lot of helpful information in
18 understanding what the defendants were doing, how it
19 dovetailed with the manufacturers, how manufacturers and
20 distributors worked together, how issue management plays a
21 role in marketing, how channel management plays a role in
22 marketing. And I think that all of those things mean that
23 she has many helpful opinions to provide.

24 To the extent that she -- that plaintiffs try to go
25 beyond that and have her, use her to tell things that she's

1 not helpful for, I think the Court can curtail that at
2 trial.

3 The fact that she doesn't have an opinion that any of
4 the marketing was false is not a weakness. We're proving
5 that through other experts. Again, it points to the limits
6 of what a marketing expert is good at and what a marketing
7 expert is not. We have other evidence for that.

8 I think, Your Honor, that unless you have further
9 questions, I think that takes me to the end.

10 THE COURT: I don't. We've got a little bit of
11 time left and I want to give Ms. Watterson the chance to
12 respond.

13 Can you do it in ten minutes?

14 MS. WATTERSON: I can, Your Honor. Can you hear
15 me? Did I turn on my mic? I am going to bring to bear the
16 skills that I use in the appellate court when I only have
17 five minutes for rebuttal. So I have a few points. It's
18 not going to be perfect prose, but I'm going to check the
19 box, boxes of what's on my list.

20 And I'm going to try to bring us back to *Daubert*, not
21 an overall argument on the marketing case and the strength
22 and weaknesses of the evidence. I just want to look at
23 these experts.

24 Your Honor, I'm not going to say anymore during this
25 argument about the lack of qualifications when it comes

1 to -- and I don't mean to be disrespectful just using their
2 last names -- Keyes, Lembke and Kolodny when it comes
3 specifically to the issue of whether they can say marketing
4 drove prescribing of opioids in a way that led to
5 oversupply.

6 I know they have opinions in other areas. That's what
7 Judge Polster correctly said that they cannot testify on
8 because they do not have the expertise. So that's in our
9 brief. And again, Your Honor, we don't just rely on Judge
10 Polster. We describe why he was correct on that.

11 On methodology, these experts, the three that purport
12 to offer an opinion in this case -- again, this is
13 plaintiffs' marketing liability here, distributors
14 marketing, distributors marketing, whether on their own or
15 in collaboration -- but, by the way, there is no evidence of
16 collaboration with respect to the assertions in the
17 complaint, the seven supposed falsehoods that drove
18 overprescribing.

19 But setting that aside, there was no method brought to
20 bear by Keyes, Kolodny, or Lembke that answers that question
21 based upon the review of what needs to be reviewed, not just
22 academic literature that says, well, it's possible that this
23 could impact this.

24 They admitted that they did not look -- and we have
25 citations in our brief to support, and I'm sorry I don't

1 have the page for you, Your Honor. They did not -- they do
2 not know whether any distributors disseminated any marketing
3 material. They don't know whether any doctors at all, much
4 less those in Cabell County, saw any such marketing
5 materials or whether any doctors relied on those materials
6 in writing an opioid prescription.

7 So in order to proffer an opinion that distributors
8 engaged in marketing that drove overprescribing, one would
9 think you would need to know those things. Did we, in fact,
10 disseminate material? Did anybody see such material, and
11 whether doctors relied on those materials? That's the type
12 of study and analysis that needs to be done, not the
13 literature review that was discussed. And by these experts'
14 own admissions, they didn't do that.

15 And I think Ms. Bierstein basically admitted because
16 she didn't defend the notion that they looked into Cabell
17 and Huntington. They didn't look in Cabell or Huntington.
18 So that -- and, again, we laid this forth in our brief.
19 They didn't engage in the right methodology.

20 Let me say something again about Mohr. You know, there
21 was a suggestion that our argument on Mohr was a
22 late-breaking argument with respect to Mohr. It was really
23 how all of the pieces fit together, you know, given what she
24 had disclaimed in terms of, "I don't have anything to say
25 about falsehoods. I don't have anything to say about this

1 causation question." My question was limited to whether
2 distributors engaged in marketing.

3 And I think that this Court's April 8th opinion, you
4 know, speaks to that notion of, you know, Mohr getting up on
5 the stand and just going through the litany of inventory of
6 activities that she says are marketing. That's not helpful
7 to the Court.

8 They've got to put into putting evidence saying what we
9 did, and then the fact finder, Your Honor, needs to
10 determine whether that, that moved the needle. And we don't
11 need her to give a narrative on that evidence.

12 So, you know, just about everything that I said in this
13 rebuttal, Your Honor, is in the brief. It is supported by
14 citations to the record, citations to the record of these
15 experts who were very candid in their deposition in terms of
16 telling us what they did and didn't do, what they reviewed,
17 and what they didn't review.

18 You know, Dr. Keyes, for instance -- I know I keep
19 focusing on this because there is this assumption, not yet
20 proven, that there was this collaboration with
21 manufacturers. There's no evidence of that.

22 And Keyes herself said she didn't -- she's not really
23 talking about distributors. She says the materials that I
24 looked at, and these are my words, not hers, that she thinks
25 moved the needle were manufacturer materials. And, you

1 know, that's in her deposition. We've cited to those pages
2 in our brief.

3 So, again, taking it back to *Daubert*, I'm not going to
4 respond on all of the arguments with respect to the
5 marketing theory, but we have three experts who may be
6 highly qualified to testify in other areas and may very well
7 be on the stand in this case. They simply are not qualified
8 to testify with respect to the marketing theory.

9 Jakki Mohr has nothing to say on causation or falsity.
10 And all she's really going to provide to the Court is a
11 laundry list and inventory.

12 And I'm arguing on qualifications, not asking you to
13 rule the same way Judge Polster ruled just because he ruled
14 that way but, instead, because that is the correct outcome
15 here.

16 One last comment on that. There was an assertion --
17 and, again, I'm doing a checklist here, not in a beautiful
18 narrative. There was a suggestion that something had
19 changed between the time that Judge Polster issued his
20 opinion and today, a suggestion that some of the arguments
21 and reasons why plaintiffs believe Lembke and Keyes are
22 qualified were either not before Judge Polster or not
23 understood by Judge Polster.

24 We explained in our brief, again with support, why that
25 is incorrect. Judge Polster did have in front of him

1 everything that Your Honor has in front of you today.

2 And thank you for taking so much time on this marketing
3 issue, or giving the parties so much time. Appreciate it.

4 THE COURT: Well, I realize that it's important
5 for counsel to know what the result here is and I will --
6 all I can promise you is that I'll rule on these things as
7 promptly as I can. And I thank you all very much. These
8 are very helpful arguments.

9 (Proceedings concluded at 11:58 a.m.)

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1 I, Lisa A. Cook, Official Reporter of the United
2 States District Court for the Southern District of West
3 Virginia, do hereby certify that the foregoing is a true and
4 correct transcript, to the best of my ability, from the
5 record of proceedings in the above-entitled matter.

6
7
8 s\Lisa A. Cook

April 15, 2021

9 Reporter

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